

areas. These commenters improperly elevate the desire of incumbent carriers to maintain a monopoly over basic telephone service over the consumer interests embodied in the Act and the Oglala Sioux Tribe's own public pronouncements. The Commission should find that Western Wireless has satisfied the statutory requirements to be designated as an ETC for the Pine Ridge Reservation.

A. Western Wireless Satisfies the Substantive ETC Criteria

The Commission should reject the lone claim, offered by SDITC, that the Tate Woglaka Offering does not satisfy the substantive requirements for Western Wireless to be designated as an ETC for the Pine Ridge Reservation. ^{48/} As shown in the Petition, Western Wireless provides the supported services and functionalities using its existing cellular network and WLL CPE in the same manner it does for (i) its universal service offering in Wyoming, for which it recently received ETC designation from the FCC, and (ii) its universal service offerings in various other states in which it has been designated. ^{49/} SDITC bases its challenge on the notion that Western Wireless does not already have in place equipment that allows it to reach each and every potential universal service customer on the Pine

^{48/} SDITC at 24-26.

^{49/} Petition at 19-24; *see also, e.g., supra* notes 11, 34 (citing *Wyoming ETC Order*; *Texas ETC Order*; *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, 2001 WL 256382 (SD March 14, 2001)) (“GCC License Corp.”).

Ridge Reservation. 50/ SDITC's argument is untenable, as it has already been rejected by the FCC, and now by the South Dakota Supreme Court. 51/ In any event, as noted in Section I, *supra*, Western Wireless is already providing the Tate Woglaka Offering throughout the Reservation and has enrolled over 1,000 customers, and already has facilities in place to provide the enumerated services and functionalities to virtually all of the Reservation. 52/

It also should be noted that if SDITC's position were accepted, it would disqualify one of its members, Golden West, as an ETC. In its comments, Golden West reveals that it, like Western Wireless, does not actually have facilities in place to serve every single potential customer on the Reservation within its study area, but rather, Golden West sometimes must construct additional facilities to reach some customers upon a request for service. 53/ This is probably true of Great Plains

50/ SDITC at 24-26.

51/ See *ETC Declaratory Ruling*, 15 FCC Rcd 15168 ; *GCC License Corp.*, *supra* note 49.

52/ *Contra*, SDITC at 24-26 (arguing that "WWC claims a 'current' offering, but at the same time admits a need for more construction to increase its signal coverage," including that pursuant to "recently filed . . . unserved area applications [that are] still pending," and that the Petition shows Western Wireless "needs to construct additional cell sites before it will be positioned to offer its [] service on a wider scale within the Reservation"). This argument is factually inaccurate and based on a manipulative reading of the Pine Ridge Petition. Actually, we stated that the additional construction is necessary to "maximize . . . universal service signal coverage and service availability." Petition at 7.

53/ Golden West at 20 (discussing Golden West's modified line extension policy with regard to carrier's efforts when it must build facilities out to new customers).

and Mount Rushmore as well, and virtually every other landline ETC. Fortunately, the Commission has already held that the need to build out facilities upon request to reach some customers does not disqualify a carrier from being designated as an ETC. 54/ In that the Commission has already rejected SDITC's argument because it would prevent almost every carrier from being designated as eligible to receive support for extending service to high-cost customers, the argument may be easily rejected here.

B. Western Wireless Satisfies the Public Interest Criterion

In addition to satisfying the technical ETC criteria, Western Wireless' provision of the Tate Woglaka Offering satisfies the public interest requirement in Section 214(e)(6) in a manner that supports designating an additional ETC in the study areas of the rural ILECs that serve the Pine Ridge Reservation. 55/ The Pine Ridge Petition identifies several public interest benefits that would arise from designating Western Wireless as an ETC for the Reservation. Chief among these is meeting the need to improve tribal telephone penetration, as contemplated by the Commission's trilogy of tribal telecommunications decisions. The Pine Ridge Petition also demonstrated that the Tate Woglaka offering enjoys significant public support and the express approval of the Oglala Sioux Tribe, and that it brings to

54/ *ETC Declaratory Ruling*, 15 FCC Rcd at 15171, ¶ 22.

the Reservation new technology, expanded local calling areas, and a mobility option, as well as all the benefits that accrue from introducing competition. 56/ The Commission has already recognized that these benefits advance the public interest, 57/ and therefore should reject the opposing commenters' meritless suggestions that these public interest benefits are inconsequential.

To the extent opposing commenters dispute the public interest benefits of competitive entry, expanded local calling areas, and mobility, or they disagree with the need to improve tribal telephone penetration, their arguments are misplaced. First, several commenters attempt to minimize the public interest benefits inherent in the Tate Woglaka Offering by quibbling about precisely how low the Pine Ridge telephone penetration rate really is. 58/ In the Petition, we noted that the tribal telephone penetration rate was approximately 50%, based on

55/ See 47 U.S.C. § 214(e)(6) ("Before designating an additional [ETC] for an areas served by [a rural ILEC], the Commission shall find that the designation is in the public interest.").

56/ Petition at 25-29 (cataloguing public interest benefits, which include competition-driven lower rates, better customer service, and incentives for all carriers to increase efficiency, improve networks, and step up technological development). NTCA's argument, that "failure" to specify what new technologies will develop makes technological development spurred by competitive entry a non-factor, is ludicrous. NTCA at 4. While Western Wireless cannot necessarily predict what specific technologies will evolve, it is fair to suggest that carriers will pursue such improvements more quickly when competitive pressures (and consumer demand that they must meet lest they lose customers to competitors) spur them to do so.

57/ *Wyoming ETC Order* ¶¶ 16-22

58/ Golden West at 15-21; Great Plains at 2; NTCA at 5.

information received from the tribe. 59/ NTCA claims, based on prior Golden West information, that the rate is 86%; Golden West now claims that the rate is 73%; Great Plains claims the rate is 70%. 60/ To be sure, these figures show that determining tribal telephone penetration is anything but a science. 61/ But they also demonstrate – definitively – that telephone penetration on the Pine Ridge Reservation is substantially lower than the 94% penetration rate reported by the FCC for the rest of the country, 62/ and that the public interest will clearly be served by introducing a new offering that can help move the rate toward the national norm.

The opposing commenters' efforts to undermine the other public interest benefits conferred by the Tate Woglaka Offering are equally unavailing. For example, some commenters claim that the mobility feature of the WLL CPE does not advance the public interest, particularly in that mobility is not one of the supported functionalities. 63/ Western Wireless submits that the mobility feature of a universal service offering *can* factor into the public interest analysis, even if it

59/ See Petition at 26 & Appendix A.

60/ NTCA at 5; Golden West at 15-18; Great Plains at 2.

61/ We noted in the Petition that the Oglala Sioux Tribe believes the population of the Reservation has been significantly undercounted by census efforts. *Id.* at 11 n.17. Any measurement of tribal telephone penetration, therefore, would have to avoid reflecting too few households in the denominator, which would result in a higher penetration rate than actually exists.

62/ *Twelfth Report and Order*, 15 FCC Rcd 12223, ¶ 25.

63/ Great Plains at 8; NTCA at 4.

is not enumerated in Section 54.101(a). Indeed, mobility is particularly important on the Pine Ridge Reservation in that it allows residents – not all of whom can afford installation, monthly service and equipment costs – to share access to the universal service offering by moving the WLL CPE from home to home, something subscribers to wireline service cannot do. 64/

The Commission should also reject the opponents' claims of harm that will befall the public interest if Western Wireless is designated as an ETC on the Pine Ridge Reservation. The Commission has already expressly rejected general arguments that rural areas are not capable of sustaining competition for universal service support, and that designation of an additional ETC in areas served by rural ILECs will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers in rural areas. 65/ In addition,

64/ In arguing that the public interest would be harmed through requiring the incumbents to scale back improving their networks to facilitate advanced services, the rural ILECs do not hesitate to tout the public interest benefits of such advanced services, and criticize Western Wireless' data rate, even though advanced service capabilities are not among the enumerated universal service functionalities. *E.g.*, Golden West at 22-23; Mount Rushmore at 6. Arguments that the mobility feature of the Tate Woglaka Offering should be given no weight in the public interest analysis are therefore hypocritical and without merit, and the argument that wireless technologies' lower data rates somehow preclude a favorable public interest finding are likewise unavailing. The incumbents' arguments are clearly at odds with the competitive premises of the 1996 Act, which include giving *consumers* the power to choose among non-enumerated functionalities that may be bundled with the universal service offerings available to them (such as a high data rate or mobility).

65/ *Wyoming ETC Order* at ¶ 22.

the FCC has noted that any concern over rural consumers being adequately served, should the incumbent exercise its option to relinquish ETC designation under Section 214(e)(4), is effectively met when a carrier with Western Wireless' financial wherewithal and telecommunications experience commits to provide service over its own facilities that are already in place. ^{66/} The Commission has determined that empirical evidence must be provided showing that a particular rural area is incapable of sustaining more than one ETC in order to defeat an ETC designation. ^{67/}

The rural ILECs have not presented such evidence here. Their predictions regarding what may happen to their operations if a competitor captures some universal service customers are overstated and unsupported by any economic

^{66/} *Id.* at ¶¶ 18-19. In any event, the Commission also found that it is unlikely that incumbent rural ILECs will relinquish their ETC designation or withdraw service altogether simply because a second ETC is designated. *Id.* at ¶ 20.

^{67/} *See Wyoming ETC Order* at ¶ 22. Thus, Golden West's bald allegation that designating Western Wireless "would raise significant questions concerning the financial burden of stranded investment for Golden West's remaining subscribers," Golden West at 14, without more, cannot possibly stand as an impediment to FCC designation of Western Wireless here. If it could, no competitive ETC could ever be designated in a rural ILEC service area, because all the rural ILEC would need to do to avoid competition is make vague threats of possible harm. Such a result would clearly be inconsistent with the 1996 Act's intent to encourage competition and to ensure that consumers in rural areas realize the same benefits of competition as those in non-rural areas. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 01-8, Appendix A, "Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service," Section II.B ("Congress did not intend to deny rural consumers the benefits of competition when the state determines [it] is in the public interest").

or financial data. 68/ Notably, Western Wireless has been providing the Tate Woglaka Offering for the last six months, and has signed up over 1,000 customers, and the incumbent rural ILECs have made no showing that these significant inroads have affected their ability to provide universal service, to the detriment of the public interest, in any way.

More fundamentally, the incumbents' concerns about "diluting the amount of universal service support available" to them, when not tied to any specific showing of how that loss of support will harm customers, is not the focal point of public interest analyses under Section 214(e). 69/ Nothing in the Act or the FCC rules provide rural ILECs with a special dispensation from competition, and the Commission and the courts have, to the contrary, ruled that prohibiting competition in rural areas is impermissible under the Act. 70/

68/ The low penetration rate on the Pine Ridge Reservation makes it less likely that Western Wireless will divert universal service support from the incumbents to the extent the Tate Woglaka Offering enrolls customers who do not currently subscribe to telephone service. *See supra* notes 59-61 and accompanying text (tribal non-subscription ranges anywhere from approximately one quarter to one half of the potential subscribers on the Reservation).

69/ *See* SDITC at 33; *see also* Mount Rushmore at 7.

70/ *Silver Star Telephone Co., Inc. Petition for Preemption & Declaratory Ruling*, Memorandum Opinion & Order, 13 FCC Rcd 16356 (1998), *aff'd sub. nom RT Communications v. FCC*, 201 F.3d 1264 (10th Cir. 2000); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (competition "necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers."); *cf.*, *Texas ETC Order*, *supra* note 34 at Finding of Fact

[footnote continues]

Finally, the claim that “there is no showing . . . that ETC designation is necessary for the provision” of the benefits arising from the Tate Woglaka Offering is mistaken. Western Wireless commenced providing the Tate Woglaka Offering on November 7, 2000, 71/ and has currently enrolled over 1,000 customers. While Western Wireless’ costs to provide the Tate Woglaka Offering are not identical to the incumbents’ costs, Western Wireless’ costs are still substantially higher than the \$14.99 per month it charges for the Tate Woglaka Offering. At present, Western Wireless is losing substantial amounts of money every month just by offering the service in hopes of improving tribal telephone penetration. Moreover, Western Wireless cannot lower the price of the Tate Woglaka Offering for qualifying low-income residents of the Pine Ridge Reservation to the \$1.00-per-month level contemplated by the Commission as part of its trilogy of orders on tribal telecommunications. 72/ Designation as an ETC is thus just as “necessary” to support Western Wireless’ efforts as it was to support the incumbents’ provision of universal service.

In sum, the public interest clearly compels Western Wireless’ designation as an ETC in the Reservation portions of the rural ILEC study areas,

71/ (“Prohibiting WWC’s ability to provide telecommunications service because of the alleged effect on incumbent providers would violate Section 253(a) of the Act.”).

71/ Petition at 3-4.

72/ *Twelfth Report and Order*, 15 FCC Rcd at 12230-35, ¶¶ 42-52.

given the substantial benefits the Tate Woglaka Offering has delivered and yet promises, and that the rural ILECs have offered no more than the most generalized showing of the impact the offering will have on their customers. The FCC should designate Western Wireless as an ETC for the Pine Ridge Reservation.

IV. THE COMMISSION MAY DESIGNATE WESTERN WIRELESS FOR A SERVICE AREA COMPRISED OF THE PINE RIDGE RESERVATION

The Commission should reject as meritless the argument, floated by several commenters, that FCC designation of Western Wireless as an ETC under Section 214(e)(6) is somehow barred entirely by the Section 214(e)(5) requirement that competitive ETCs serve the entire study area of any rural ILEC in the new entrant's proposed service area. ^{73/} Just as a state commission can grant ETC status to incumbent carriers whose study areas cross state lines for only that portion of the rural ILEC's study area within the given state's borders, the FCC can grant ETC status for only that part of a new entrant's service area over which Section 214(e)(6) gives the FCC jurisdiction. Alternatively, the Commission can forbear from enforcing any relevant Section 214(e)(5) obligations when designating carriers under Section 214(e)(6) for rural ILEC study areas that are bifurcated by geographic jurisdictional boundaries.

^{73/} SDPUC at 20-24; Golden West at 10-12; SDITC at 18-24; Mount Rushmore at 5-6.

A. The Commission Should Follow the Approach in the *Wyoming ETC Order* and Simply Designate Western Wireless as an ETC for the Portions of the Rural ILEC Study Areas Within the Pine Ridge Reservation

The *Wyoming ETC Order* properly resolved the tension between Section 214(e)(5), requiring ETCs to serve an entire rural ILEC “study area,” and Sections 214(e)(2) and (e)(6), which require the designating commission to act within jurisdiction that is delimited by state lines, notwithstanding the existence of study areas that may lie in more than one state. ^{74/} In that case, the FCC correctly designated Western Wireless for the Wyoming portions of those rural ILECs’ study areas, leaving it to the adjoining state commissions to designate Western Wireless for the remainder of the rural ILECs’ study areas. Western Wireless submits that the Commission should employ the same approach here, and determine that, rather than being barred from designating Western Wireless as an ETC for the Pine Ridge Reservation, the interaction of Section 214(e)(5) and Section 214(e)(6) allows FCC designation within the specific area where the state lacks jurisdiction.

This approach has a strong basis in tenets of statutory interpretation. When acting in place of a state commission to determine a petitioning carrier's ETC status under Section 214(e)(6), the Commission “steps into the shoes” of the state commission. ^{75/} In the Wyoming case, the Wyoming Commission would not have

^{74/} *Wyoming ETC Order* at ¶ 24.

^{75/} *Twelfth Report & Order*, 15 FCC Rcd at 12255, ¶ 92.

had authority to grant or deny ETC designations outside the state's boundaries, and so the actions of the Commission properly extended only as far as the Wyoming commission's authority – the boundaries of that state. Similarly, in this case, the FCC's authority extends only to the area where the SDPUC lacks jurisdiction, *i.e.*, the boundaries of the Pine Ridge Reservation. 76/ This common-sense resolution would be entitled to significant judicial deference given that, where a statute is ambiguous or rests on factually incorrect assumptions (such as the relationship between jurisdictional boundaries and rural ILEC study areas), administrative agencies must have sufficient leeway to adopt practical solutions. 77/

The opposing commenters argue that the proper solution is to forestall the designation of a competitive ETC until a study area disaggregation proceeding

76/ See *Wyoming ETC Order*, ¶ 24 n. 72 (citing *Texas ETC Order*, *supra* note 34, at 6-7).

77/ See *Chevron, U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837 (1984). See also *White Mountain Apache*, 448 U.S. at 143-44 (“ambiguities in federal law have been construed generously in order to comport . . . with traditional notions of sovereignty and with federal policy encouraging tribal independence”); *Cheromiah v. U.S.*, 55 F.Supp.2d 1295, 1308 (D. N.M. 1999) (quoting same and finding both consensual relationship and health, education and welfare exceptions for finding tribal jurisdiction under *Montana v. U.S.* met for hospital on reservation). Thus, resolving the tension between Section 214(e)(5) and Section 214(e)(6), which was adopted primarily to deal with the issue of telecommunications on tribal lands (which are typically in rural areas), see *Twelfth Report and Order*, 15 FCC Rcd at 12261, ¶ 106, in a manner that leads to on-reservation ETC designations, would likely receive substantial judicial deference.

could occur pursuant to Section 54.207(c) and (d) of the FCC's rules. ^{78/} However, the suggested additional proceedings, including disaggregation proceedings, would cause unreasonable and unnecessary delay in Western Wireless' ability to obtain ETC designation. This, in turn, would delay the receipt of universal service support necessary to sustain the much-needed improvement in telephone service that has been brought to the Pine Ridge Reservation by the Tate Woglaka Offering, and the developing competition currently taking root on the Reservation. It would also delay Western Wireless' ability to reduce the cost of the Tate Woglaka Offering for qualifying low-income residents on the reservation. ^{79/} These results are clearly at odds with the pro-competitive purpose of the 1996 Act, and the intent behind the Commission's efforts to improve telephone service on tribal lands.

B. If Necessary, the Commission May Forbear from Enforcing the Requirement that it Designate Western Wireless for the Entire Study Area of Every Rural ILEC Serving the Reservation

Even if the Commission determines that as a matter of statutory construction it cannot simply designate Western Wireless to the limits of FCC authority under Section 214(e)(6) – *i.e.*, the Pine Ridge Reservation, where the SDPUC lacks jurisdiction over the Tate Woglaka Offering – the Commission may still designate Western Wireless as an ETC for the Reservation. To do so, the

^{78/} Great Plains at 7; Mount Rushmore at 5; Golden West at 10-12 (citing 47 C.F.R. §§ 54.207(c)-(d)).

Commission would merely, under Section 10 of the Act, forbear from imposing the Section 214(e)(5) requirement that Western Wireless serve the entire study area of every rural ILEC serving the Reservation. 80/ Such forbearance would be consistent with the standards set forth in Section 10 of the Act, and with FCC forbearance precedent.

Forbearance is authorized under Section 10 of the Act, which requires the Commission to forbear from applying specific provisions of the Act where:

(1) enforcement is not necessary to ensure charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. 81/

Forbearance is available in this case, notwithstanding that Western Wireless did not accompany the Pine Ridge Petition with a petition for forbearance. The FCC has on several occasions exercised its Section 10 forbearance powers *sua sponte* as

79/ See *supra* at 5 (citing *Twelfth Report and Order*, 15 FCC Rcd at 12230-35, ¶¶ 42-52).

80/ See 47 U.S.C. § 160 (allowing the FCC to “forbear from applying any regulation or any provision of this Act” where certain circumstances are met).

81/ *Id.* As to the public interest determination required by Section 10(a)(3), “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a [] finding that forbearance is in the public interest.” *Id.* § 160(b).

the need to do so has arisen in a proceeding and/or after proposing to do so in a rule-making proceeding, even though no party filed a formal petition for forbearance. 82/

Forbearing from enforcing Section 214(e)(5) in the present case would satisfy each of the three criteria in Section 10(a) of the Act. First, enforcement of the rural study area requirement of Section 214(e)(5) is not necessary to ensure just, reasonable, and non-discriminatory telecommunications services. Western Wireless lacks market power, especially in the universal service marketplace, so competitive market forces will ensure that Western Wireless' offerings are just, reasonable, and not unreasonably discriminatory. 83/ Moreover, Western Wireless will continue to be subject to Sections 201 and 202 of the Act. 84/ Most importantly, the provisions of the Tate Woglaka Service Agreement provide for oversight over Western Wireless' rates and services by the Oglala Sioux Tribe.

82/ See, e.g., *ComTech Petition for Declaratory Ruling that Licensees of Nationwide 220 MHz Mobile Communications Systems Are Not Required to License Separately Each of the Systems' Base Stations*, File No. WTB/Pol 96-1, Memorandum Opinion and Order, 14 FCC Rcd 16779, 16781 n.12 (FCC 1999) ("We take this action on our own motion pursuant to Section 10(a) of the Act."); *1998 Biennial Regulatory Review – Repeal of Part 62 of the Commission's Rules*, 14 FCC Rcd 16530 (1999).

83/ See *Petition of U S WEST Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21086, ¶ 33 (1999) (finding Section 10(a) satisfied where petitioner was new entrant to the relevant market and did not hold monopoly power over the relevant service).

84/ 47 U.S.C. §§ 201, 202 (controlling, respectively, "service and charges" and "discrimination and preferences").

Likewise, enforcement of Section 214(e)(5) here is not necessary to protect consumers, for the reasons stated above. In addition, forbearance is in the public interest, because it is necessary to enable Western Wireless to be designated as an ETC on the Pine Ridge Reservation, which in turn is needed to maintain the provision of the Tate Woglaka Offering to the severely underserved population of the Pine Ridge Reservation, and to lower the price for low-income consumers to the level contemplated by the Commission. ^{85/} Forbearance in this context will not enable Western Wireless to engage in “cherry picking” (*i.e.*, selectively serving only the lowest-cost consumers), the practice that Section 214(e)(5) appears to be principally designed to prevent. To the contrary, the Pine Ridge Reservation is one of the most remote and sparsely populated portions of the Golden West, Great Plains, and Mount Rushmore study areas, and its costs of service are high. ^{86/}

Next, pursuant to Section 10(b), forbearance will promote competitive market conditions for the provision of universal service on the Pine Ridge Reservation. The FCC has recognized that it is difficult or impossible for competitive carriers that have not received ETC designation to compete effectively with an

^{85/} See *supra* at 4-5 (noting that Western Wireless is losing substantial amounts every month on its Tate Woglaka Offering due to lack of universal service support) and 5 (citing *Twelfth Report and Order*, 15 FCC Rcd at 12230-35, ¶¶ 42-52).

^{86/} *E.g.*, Great Plains at 8 (“the incumbents have high cost of service which requires support in order to maintain reasonable local rates”); Mount Rushmore at 6 (“The gross embedded plant investment for providing service to the area within the Reservation is approximately . . . \$5,225 per access line.”).

incumbent ETC. 87/ Forbearance here will enable Western Wireless to receive ETC designation and to compete effectively with the incumbent rural ILECs, to the ultimate benefit of consumers on the Reservation.

Finally, it bears noting that Western Wireless is not seeking to serve only part of a rural ILEC service area here, nor is it the case that Western Wireless' FCC licenses do not allow it to serve the rest of the study areas of the three rural ILECs that serve the Reservation. Western Wireless seeks to provide universal service throughout South Dakota, and has the facilities in place to do so. 88/ But the instant proceeding concerns only the Tate Woglaka Offering on the Pine Ridge Reservation. 89/ It is impossible for Western Wireless to provide service pursuant to the Tate Woglaka Service Agreement to portions of the Golden West, Great Plains and Mount Rushmore study areas outside the boundaries of the Pine Ridge Reservation. The Tate Woglaka Offering is designed specifically to meet the needs of the Pine Ridge Reservation, and is subject to the sovereign jurisdictional

87/ *ETC Declaratory Ruling*, 15 FCC Rcd at 15174-75, ¶¶ 17-18 (2000).

88/ Given the pending petition for ETC designation in the rural ILEC study areas in South Dakota, which the SDPUC has been ordered to expedite, *see supra*, *GCC License Corp.*, 2001 WL 256382, any assertion that "Western Wireless' Petition does not propose service to the entire . . . study area" of the rural ILECs serving the Reservation is disingenuous. *Golden West* at 14.

89/ Given that, at the end of the day, it is Western Wireless' intent to be designated in the whole of the commenting rural ILECs' study areas, designation of Western Wireless as an ETC for the Pine Ridge Reservation does not require any changes to the operations or study area boundaries of Golden West, Great Plains or Mount Rushmore.

authority of the Oglala Sioux Tribe, which runs only to the borders of the Reservation. The service is inappropriate for areas outside the boundaries of the Reservation. Forbearance is required due only to the jurisdictional quirk of the SDPUC lacking jurisdiction over the Tate Woglaka Offering, and the FCC lacking jurisdiction in the rest of the state.

V. THE OPPOSING COMMENTERS' REMAINING CHALLENGES ARE EASILY DISMISSED

The Commission can readily reject the remaining objections to granting Western Wireless ETC status for its provision of the Tate Woglaka Offering. First, SDITC's argument that Western Wireless requires a certificate of authority from the SDPUC is without merit. 90/ As explained at length above, the Tate Woglaka Offering is not subject to the jurisdiction of the SDPUC, and even if it were, the certificate of authority requirement is entry regulation from which Western Wireless is exempt as a CMRS provider for purposes of its mobile wireless provision of universal service, including the Tate Woglaka Offering. 91/ The Commission can just as easily reject SDITC's objection over the fact that the Public Notice in this matter solicited comment on the jurisdictional issues and the merits

90/ SDITC at 26-28.

91/ See 47 U.S.C. § 332(c)(3); *see also supra* note 34 and accompanying text. To the extent SDITC's argument rests on the notion that Western Wireless' universal service offerings are not CMRS, that issue is already before the FCC in another proceeding, and that it is where it should be resolved. *See supra* note 34.

of the Pine Ridge Petition, and apparently contemplates only a single pleading cycle to receive the parties' input on both. 92/ The *Twelfth Report and Order* merely contemplates that the Commission first issue an order deciding whether it has jurisdiction over the petition, then, no later than six months after that, an order on the merits. Nothing in the *Twelfth Report and Order* requires the Commission to issue separate public notices for the jurisdictional and substantive issues presented by an ETC petition for tribal lands, nor that it conduct separate pleadings cycles on those issues, contrary to the position taken by SDITC. 93/

Finally, Golden West's suggestion that "Western Wireless has compromised the integrity of the Commission's processes" by inviting the Oglala Sioux Tribe, then-Chairman William Kennard, then-Commissioner (now Chairman) Michael Powell, and Commissioner Susan Ness to participate in a ceremony commemorating the Tate Woglaka Service Agreement, is wholly unfounded. 94/ Both

92/ SDITC at 35-38.

93/ *Id.* at 37 (citing *Twelfth Report and Order*, 15 FCC Rcd at 12266-67, ¶¶ 120-21). Nothing in that order requires that the FCC not decide jurisdiction and the merits contemporaneously, nor precludes a decision on the merits in substantially less time than the six months allotted after the jurisdictional determination. In addition, the FCC has received comments and petitions for reconsideration arguing that shorter or consolidated consideration of ETC petitions is possible, and it has taken those suggestions under advisement. *See Twelfth Report and Order*, 15 FCC Rcd at 12277-78, ¶¶ 151-53 (FNPRM); Western Wireless Petition for Reconsideration, filed Sept. 5, 2000, at 15-17; Comments of the Competitive Universal Service Coalition, filed Sept. 1, 2000, at 3-6.

94/ Golden West at 23-25.

the Oglala Sioux Tribe and the FCC participants were aware that the Pine Ridge ETC Petition would be forthcoming. In any event, participation by Commissioners and FCC staff members in witnessing or signing a proclamation that the Tate Woglaka Offering is "intended to serve the universal service needs of the residents of the Reservation" hardly prejudices either the jurisdictional issues or the merits associated with the Pine Ridge Petition.

VI. CONCLUSION

For the foregoing reasons, Western Wireless should be designated as an ETC for its requested service area on the Pine Ridge Reservation in South Dakota.

Respectfully submitted,

**WESTERN WIRELESS
CORPORATION**

By: 

Gene DeJordy,
Vice President, Regulatory Affairs
WESTERN WIRELESS CORPORATION
3650 - 131st Ave. S.E., Suite 400
Bellevue, WA 98006
(425) 586-8055

Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON, L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

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SERVICE LIST

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Hon. Susan Ness, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-B115
Washington, D.C. 20554

Hon. Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-A302
Washington, D.C. 20554

Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., Room 8-C302
Washington, D.C. 20554

Marsha McBride, Chief of Staff
Office of Chairman Michael K. Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Legal Advisor
Office of Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Rebecca Beynon, Legal Advisor
Office of Commissioner Harold
Furchtgott-Roth
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Kyle D. Dixon
Legal Advisor
Office of Chairman Michael K. Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Sarah Whitesell
Legal Advisor
Office of Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Carol Matthey
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Katherine Schroder, Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Anita Cheng, Associate Chief
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Katie King
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Robert Loube
Policy Analyst
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Richard D. Smith
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jack Zinman
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

International Transcription Service
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Honorable John Steele
President
Oglala Sioux Tribe
P.O. Box H
Pine Ridge, South Dakota 57770

Joseph Red Cloud
Oglala Sioux Tribe
Economic Development Office
P.O. Box 669
Pine Ridge, South Dakota 57770

Honorable Jim Burg
Commissioner
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

Honorable Pam Nelson
Commissioner
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

Rolayne Ailts Wiest
General Counsel
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070